IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 839

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

vs.

PLYMOUTH MANUFACTURING CORPORATION, ET AL.,
Respondents.

RESPONSE OF RESPONDENTS HUBERT TANNER, WILLIAM H. WOLFARTH, GEORGE E. WARREN, AND CHESTER H. THOMPSON, INDIVIDUALLY AND FOR THEMSELVES AND AS REPRESENTATIVES OF ALL PERSONS CONSTITUTING THE COPARTNERSHIP DOING BUSINESS UNDER THE NAME AND STYLE OF PLYMOUTH MANUFACTURING COMPANY.

ALBERT B. CHIPMAN,
WALTER R. ARNOLD,
Attorneys for Respondents.

Dated April 15, 1944.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

CASES CITED.

IN THE

Supreme Court of the United States

No. 839.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

vs.

PLYMOUTH MANUFACTURING CORPORATION,
ET AL.

RESPONSE OF RESPONDENTS HUBERT TANNER, WILLIAM H. WOLFARTH, GEORGE E. WARREN, AND CHESTER H. THOMPSON, INDIVIDUALLY AND FOR THEMSELVES AND AS REPRESENTATIVES OF ALL PERSONS CONSTITUTING THE COPARTNERSHIP DOING BUSINESS UNDER THE NAME AND STYLE OF PLYMOUTH MANUFACTURING COMPANY.

Statement of the Facts.

The petitioner has so studiously edited the facts by interlarding the same with his conclusions and inferences, (drawn to accord with his *contentions* below, and which were rejected by the District Court and the Circuit Court of Appeals) that it is probably appropriate that a recast of the facts, as borne out by the record, be presented untarnished by "subjective considerations" so obviously im-

pinging on the petitioner's "statement"; and these respondents, therefore, present herewith, a composite of the uncontroverted *factual picture* as it existed when the District Court had the case before it, to-wit:

The Corporation.

1. Plymouth Manufacturing Corporation was then the owner of real property and mechanical equipment in Plymouth, Indiana, which constituted a manufacturing plant suitable for the production of wooden packing receptacles used principally in interstate commerce. (Tr. 271.) It had conducted business along the same line at its plant up to October 22, 1938. (Tr. 280 to 283.) Thenceforward it engaged in only two activities—as lessor of the plant and assisting the sub-lessee firm in a financial way, as lender of credit which the firm had not yet established. (Tr. 28b.) At the time of the trial the corporation was in process of dissolution. (Tr. 205-206 and 281b.)

2. Its resolution to cease operations in October, 1938, was impelled because of its inability to compete with other establishments in the same line of business, especially in view of the Wage and Hour law then on the threshold of effectiveness. (Tr. 274 to 275.) It did not make any profit, but suffered consistent losses, for several years before it discontinued business. (Tr. 272 to 273.)

The Lease of the Plant.

3. A group of the former employees of the corporation, on announcement of the Corporation's purpose to discontinue operations, in the summer and early fall of 1938, engaged in negotiations with the management of the corporation, seeking an arrangement whereby the plant would be let to them for operation by the employees on a co-operative basis. (Tr. 274-Tr. 278.) An agreement was reached to let

the plant to four of the former officers of the corporation (also employees of the corporation) and a sub-letting dated October 10, 1938 (Tr. 81c), from the latter to all those who would band together to engage in the co-operative enterprise. The lease was subsequently amended, and as amended and (so far as material here) it provided:

(a) Term began October 22, 1938, to continue indefinitely, but terminable on 30 days' notice from either party to the other. (Tr. 84b.)

(b) Rental to be paid

1. Five per centum of gross sales of commodities and merchandise fabricated on the premises. (Tr. 98b.)
2. Payment by lessees of all taxes levied against the lessor, including State and National income and capital stock taxes. (Tr. 97c.)
3. Insurance premiums on casualty coverage. (Tr. 98a.)

(c) Lessor agreed

1. To make funds available by way of loans to lessees or arrangements for credit to them, the corporation to be paid interest on any such loans at the rate of 6 per centum per annum. (Tr. 96b.)
2. On termination of the lease, to purchase, from the lessees, all tangible and intangible personal property on the premises, paying full appraised value therefor to the lessees.
3. To permit subletting of the demise. (Tr. 84c.)

The Articles of Partnership.

4. Twelve days later the original partnership articles were executed (Tr. 85c) and, as modified by subsequent amendments, provided:

(a) The fiscal affairs and general direction of the firm's business should be conducted by a board of control, consisting of six of the partners, to be elected by all of the members of the firm, one member of the

board being elected each last secular day in June to take his place on the following first of July, and one being elected each last secular day in December to take his place on the board the following first day of January. The term of one member of the board terminated on each the first day of July and the first day of January, of each year. (Tr. 86, 87, 93 and 94.)

The Board of Control.

(b) The Board of Control had the following general powers:

1. To direct the work to be done by the several members of the firm.

2. By unanimous vote of the board members present, but not unless acquiesced in by majority vote of the whole membership of the firm or by unanimous vote of the Adjustment Committee, hereinafter referred to, to terminate the partnership as to any member of the firm on account of

> "Any unlawful, unworkmanlike practice or conduct of disloyalty to the firm or non-conformity with any of the provisions of the Articles of Partnership is done or suffered to be carried on by"

such offending co-partner, and to exclude such offender from the premises. (Tr. 86a, 94c, 116c, 117a.)

3. To admit new members to the firm if the Adjustment Committee (hereinafter described) and the Board of Control should unanimously agree thereto, otherwise to be submitted to a secret ballot vote of the entire firm membership. (Tr. 116c and 117a.)

4. To employ and discharge employees as occasion might dictate, and to fix their remuneration. (Tr. 86c.)

5. To make all contracts and agreements appertaining to the firm business. (Tr. 87a.)

6. To determine when and to what extent contributions to the firm assets should be accepted by

the firm and from its membership, and to fix the value thereof, including the value of work contributions so to be made by the firm membership. (Tr. 88.)

7. To be the sole judge of when and in what circumstances there should be a dissolution of the firm, on giving thirty days' notice to each member of the firm indicating the Board's intention to do so. (Tr. 87a.)

8. On dissolution, to liquidate the firm assets and make distribution of the net proceeds among the firm membership in exact pro ration as provided for the distribution of firm profits (see subparagraph 11, *infra*, this section). (Tr. 87.)

9. To have the exclusive power to collect all moneys due the firm; to borrow money on the credit of the firm; and to pledge firm assets as collateral thereto. (Tr. 87b.)

10. To accumulate and control a reserve fund to be built up out of the net profits of the firm (after deduction of the drawing accounts of the members) equal to thirty percentum of such net profits to be used for the payment of the debts of the firm and as a reserve for stringent business periods. (Tr. 114b.)

11. To distribute quarterly among the copartners (in like pro ration as the drawing account of each bore to the aggregate drawing accounts of all) all net firm profits of the firm not covered into the reserve fund mentioned in subparagraph (10) hereof. (Tr. 114b.)

12. To issue, on admission, to each member of the firm a partner's participation certificate disclosing the rate and value of the contributions in labor or property each had made or was to make to the firm. (Tr. 88c-89.)

The Adjustment Committee.

(c) An Adjustment Committee, consisting of five of the co-partners, was provided for, to be elected in the same manner and at the same time provided for the election of members of the Board of Control. Its powers and duties were:

1. To hear and investigate and present to the Board of Control grievances, recommendations, and other communications of individual partners, pertaining to such individual's status in the firm or the general affairs of the partnership. (Tr. 116c.)

2. To exercise delegated power which the Board of Control might vest in it from time to time in relation to the conduct of the firm business. (Tr. 116c.)

3. To agree with the Board of Control to dispense with the entire firm membership vote on admission of applicants to membership in the firm or termination of the partnership relation with respect to any particular partner. (Tr. 117a.)

4. To require special meetings of the partnership to be called by the Board of Control. (Tr. 117b.)

Distribution of Profits.

(d) As to distribution of profits realized by the firm, the procedure set forth was as follows:

1. Account was to be kept of each partner's contribution of money, property or labor to the firm benefit. (None of the members had contributed anything to the firm other than labor up to the time of trial.) The value of each such contribution was fixed by the Board of Control. (Tr. 88a.)

2. Succeeding the lapse of ten days after making such contribution, each member of the firm was permitted to withdraw from the firm, as advance distribution of profits, an amount equal to the

aggregate value of his contributions to the firm. Thus ten days' contribution of services, as to each member of the firm, was at all times to remain undrawn in the partnership account. (Tr. 89a.)

3. Each three months—December 10th, March 10th, June 10th and September 10th—distribution of the net profits to all the partners was to be effected by deducting from the total profits made in the quarter ending at the end of the month previous, the aggregate partnership withdrawals, then thirty per centum of the balance for reserve, and the remaining seventy per centum divided amongst the partners pro rata in like proportion as each their respective drawing accounts in that quarter bore to the aggregate of all the partners' drawing accounts during such quarter. (Tr. 88a and 114b.)

Withdrawal and Dissolution.

(e) On dissolution, after payment of all debts of the firm, the balance of the liquidation proceeds was to be pro rated amongst the firm membership in like manner as were excess profits. (Tr. 87b.)

(f) On withdrawal of any partner from the firm, an accounting was to be made with him by the Board of Control, within thirty days after the end of the quarter in which the member severed his connection with the firm, and payments to him for his share of excess profits on the same basis as with the remaining partners, but such settlement disposed of all his rights in the firm property. This was so whether he withdrew from the firm voluntarily or *ex mero motu* the firm membership or, in lieu thereof, the unanimous agreement of the Board of Control and Adjustment Committee, that the firm be dissolved as to him. (Tr. 91a.)

Assignment of Partner's Interest.

(g) No partner's interest in the firm could be assigned, without the unanimous consent of the membership of the Board of Control (Tr. 94c) and in the event of death or permanent disablement of any partner, settlement would be made by the Board of Control with him or his estate—as the case might be—precisely in the manner it would be effected had the deceased partner withdrawn from the firm at the time of his death, or disability exceeding thirty days. (Tr. 91c.)

Firm Assumed Obligations of Lease.

(h) It was stipulated in the articles of co-partnership that the firm sub-leased from the original lessee the premises leased by the latter from the corporation, and as consideration therefor, the firm assumed and undertook to pay and discharge all of the original Lessees' obligations under the lease with the corporation and was to become vested with all of the rights and privileges of the lessees under the lease. (Tr. 85c and 100a.)

All Workers Firm Members.

5. With five or six exceptions (persons who became employees of the new firm), each person working in the plant and in any manner rendering personal service in the business of the firm, had subscribed these articles of co-partnership either before or shortly after he or she commenced rendering such service. (Tr. 204b.) This was true from the 24th day of October, 1938, to the date of the hearing. (Tr. 212c.) There was no contention that any person, who was indisputably an "employee"—the five or six exceptions aforesaid—had at any time been employed by any of the defendants in violation of the Fair Labor Standards Act. Every member of the firm (worker) had an interest in the firm profits and no person, firm or corporation, not a mem-

ber of the firm, had any direct interest in the firm profit or losses. (Tr. 205a and Tr. 301-304.)

No Fraud or Legal Duress.

6. No fraud or duress was practiced upon any worker to induce or compel him to engage in the articles of co-partnership. (Tr. 128-129.) Each knew that by subscribing the articles he was becoming a member of a partnership and, as such, would be liable for all of the debts of the firm. (Tr. 236, 237.) All were given to understand that it would be the policy of the firm to confine the man-power needed in the plant to be expended by partners only, and that failing to become members of the firm, meant, in almost every instance, cessation of earnings at the plant. (Tr. 267.) There was never any discharge of employees by the corporation. It merely ceased to function as employer of anyone (excepting four or five officials) on and after October 22, 1938. (Tr. 280 and 281.) Up to the time of dissolution proceedings it did, of course, have an indirect interest in prosperity of the partnership—the latter owed it for rent, advances made and materials purchased from it to upwards of $40,000.00. (Tr. 122c.) It was vitally interested to see that the partnership (and, in consequence, the individual partners) made profits out of which the firm could pay the corporation the rent and the debt owing by the firm to it. Other than that indirect interest, the corporation had no concern with gain or loss, profit or income resulting from the operations of the firm.

Tomlinson's Connection With the Firm Affairs.

7. On December 11, 1939, the firm arranged for a line of credit up to $75,000.00 with State Exchange Bank of Culver, Indiana. An indemnifying mortgage was given the bank to secure it against loss in extending such credit. In

this instrument appellee Sam Tomlinson was designated trustee. It was provided that Tomlinson should apply any proceeds of liquidating any collateral thereby given to the payment of any past due indebtedness of the firm. (Tr. 100-104.) The following events transpired with respect to this mortgage and debt it secured:

(a) On July 15, 1941, the firm was owing unto Culver State Bank $27,000.00 on past due promissory notes. It owed the Corporation $38,160.00 on notes and open accounts. (Tr. 106a.)

(b) Litigation was pending involving the firm in relation to unemployment insurance contributions and social security taxes, and distraint was threatened against the assets of the firm. (Tr. 107.)

(c) The firm and the mortgagees agreed that the latter, through Tomlinson as trustee (who should become general manager of the firm's business, employed by it at $25.00 per week) would take possession of the firm assets and hold them in trust for the benefit of the firm and the mortgagees until the debts secured by the mortgage were fully discharged. (Tr. 108 and 109.)

(d) The internal government of the affairs of the firm, as provided by the articles of co-partnership, and the authority of the board of control, was not to be altered, abridged, or impaired, excepting the trustee was given power to manage the finances of the firm, and supervise its outlays during continuance of the conservatorship. (Tr. 109.)

(e) In event it developed that the drawing accounts fixed by the Board of Control should be in excess of the amount of funds available from profits to make disbursement thereof to the partners, the trustee had the power to reduce them pro rata, the balance in favor of any partner to stand as a first charge against future profits of the firm. (Tr. 109.)

(f) The trustee was given power to designate (with the consent of the Board of Control) a deputy or successor trustee in event he was unable to perform all or any part of his duties as such trustee. (Tr. 110c.)

(g) All funds of the firm were turned over to the

trustee who should make disbursement thereof for the benefit of the firm and the mortgagees as provided by the agreement. (Tr. 110c-Tr. 111a.)

(h) This managership contract was in effect at the time of the hearing. (Tr. 207.)

Relationship of Respondents Warren, Thompson, Tanner, and Wolfarth to Firm.

Respondents Warren, Thompson, Tanner and Wolfarth were, prior to October 22, 1938, nominal shareholders in, officers of and employed by the corporation. When the arrangement was formulated between the employees of the corporation to lease the plant from the latter these four in effect "underwrote" the arrangements so far as concerned the employees' status in the transaction. (Tr. 133 and 134.) They, the four of them, entered into the lease with the corporation and handled most of the negotiations with counsel and the other employees to get the firm structure to functioning. (Tr. 272-278.) They acted as the original nucleus of the co-partnership, and were therein designated "senior partners." (Tr. 285.) Until an amendment to the articles of co-partnership (formally consummated about one year after its practice began in actuality) they constituted the Board of Control. (Tr. 86-88.) Never did they conduct or have anything to do with any business as individuals or co-partners pertaining to any matter involved in this case, but only as co-partners with the other workers at the plant. (Tr. 284b.)

Reasons for Denying the Writ.

It is not believed by the respondents that upon the facts before the District Court a decision in favor of the petitioner could have been sustained. The basis for such a decision would have been untenable, in that an injunction would necessarily have rested upon inferences drawn

from historical facts that had been completely superseded by events when the proceeding was begun. Unbiased consideration of these events and their contractual products as hereinabove set forth leaves little doubt that the "workers" in the Plymouth Manufacturing Company plant were —in the eyes of the law and in the conscience of equity— indisputably co-partners, because:

(a) They, and only they, had complete control, through their appointed agency (The Board of Control) of all of the activities of the enterprise, subject only to the restraining hand of their creditors (in accordance with a debtor-creditor contract executed by them) against improvident expenditure of money or assumption of obligations.

(b) They, and only they, as a co-partnership, had the right to determine the composition of the firm.

(c) They, and only they, as individual members of the firm, received the net profits of the firm.

(d) They, and only they, were liable for all of the firm debts.

There not being absent one solitary ingredient essential to the character of a pure co-partnership, to hold that the members constituting the firm were nevertheless "employees", immediately evokes the question: "Of whom were they employees?" The quintessence of petitioner's position on this question is that if any of the respondents

"suffered or permitted the workers to work on the premises"

that is, on property controlled by the firm and known as The Plymouth Manufacturing Company plant—they, *ipso facto,* constituted themselves the "employers" of the permittees under the provisions of the act. Carried *ad absurdum* every owner of a vacant lot in the city of Alexandria who permits its use by "Victory gardeners" would (save for the exception of agricultural labor from the act's provisions) be "employers" of those who scratch its surface to replenish their larders across the Potomac.

Every landlord who lets his building to a firm of auto mechanics, where the co-partners' labor resultant is to enter interstate commerce—*e. g.*, labor applied to an interstate carrier's motor trucks—is the "employer" of the co-partners, within the meaning of the act, if the landlord knows beforehand of the nature of their work and the personnel which is to perform it. Indeed, the argument, on the same principle, might be carried to the extreme of making every property owner, who admits to his premises a contractor who employs labor on the premises to fabricate goods for interstate commerce, the employer of the contractor's employees within the meaning of the act!

If the petitioner admits that this is not plausible, then he must admit with equal candor that something besides mere "permission or suffering to labor" is necessary before it is essential to spell out the "employer-employee" relationship under the act. The Congress has supplied this needful nexus:

> "Employee" includes any individual employed by an "employer." (Subdivision (e) of Section 3.)

In short, there must not only be an "employment" and an "employer", but also an "employee." There is no definition of "employer," other than broadening it by including within its ordinary meaning

> "any person acting directly or indirectly in the interest of an employer in relation to an employee."

Obviously, that leaves the status covered by the term "employer" as it was before the act was enacted, excepting stretching its reach to a vice-principal of the employer. Thus educes the 5th Circuit such import from the definitions given in the act. (*Bowman* v. *Pace Co.*, 119 Fed. (2nd) 858):

> "It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor

> suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act. * * * The conclusion that Bowman is not the employee of the Pace Company is supported by the decisions under the Federal Employers' Liability Act, g. 1, 45 U. S. C. A. g. 51. It was held that the word should be taken in its natural sense, and did not include among the railroad's employees the porters on Pullman cars who were hired by the Pullman Company, though they served the Railroad's passengers, and sometimes took up the tickets of late passengers. *Robinson* v. *Baltimore & Ohio R. R.*, 237 U. S. 84, 35 S. Ct. 491, 59 L. Ed. 849. And a similar view was taken about express company employees working on trains under an arrangement with the railroad. *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 41 S. Ct. 93, 65 L. Ed. 205. And one was not an employee of the railroad company who contracted to handle by himself and by his employees the coal for the company's engines and to remove and dispose of cinders, though he was engaged in commerce and got instructions about the performance of the work from the yard-master; it was held there was not even a jury issue about it. *Chicago, Rock Island & Pac. R. R.* v. *Bond*, 240 U. S. 449, 36 S. Ct. 403, 60 L. Ed. 735."

The idea evolving from petitioner's contentions in this respect, pressed to its ultimate terminus, would result in the solecistic conclusion that the "workers" are employees of the unlimited co-partnership of which they are the sole members! The difficulty that the petitioner experiences in answering the question, "Who is the employer?" is exemplified from the following quotation from page 15 of his petition,

> "During the period that Tomlinson or the corporation, or either of them, was the employer, Tanner, Wolfarth, Warren, and Thompson were clearly persons 'acting directly or indirectly in the interest of an employer in relation to an employee', within the meaning of the definition of employer in Section

> 3 (d) of the Fair Labor Standards Act. If, for any portion of the time in question, Tomlinson or the corporation were not employers, Tanner, Wolfarth, Warren and Thompson, acting together as co-partners or otherwise, were. If Tomlinson as trustee was not the employer himself, he was acting in the interest of the employer, whether it be the corporation, Tanner, Wolfarth, Warren, and Thompson as 'senior partners' or as dominating members of the Board of Control."

Unquestionably, if petitioner's suggestion is given concrete application, every co-partner in the country (engaged in production of goods turning into or destined for the stream of interstate commerce) is an "employer" of such of the co-partners as are active in production and not specifically excluded (executive and administrative personnel) by the terms of the Act. From thence it is but a few millimetres to the extreme absurdity that every *individual* producer for interstate commerce is his own employer! For does not the connotation urged by petitioner cover precisely that situation? It being, as respondents believe, demonstrable that a decision, contrary to that pronounced by the District Court, could not have been sustained on the strength of the interferences that petitioner here would insist were educible from the evidence, how much more foreign to petitioner's purpose it must be when the District Court has drawn contrary inferences and the Circuit Court of Appeals has declared

> "The court's finding to this effect was not clearly erroneous but instead was clearly correct"?

Petitioner suggests that the District Court and the Circuit Court of Appeals had ignored the holding of the Appellate Court of Indiana, *in re Zeits*, 108 Ind. App. 617. This was an *ex parte* opinion on a certified question of law. The Plymouth Manufacturing Company—the partnership—was granted leave to file briefs and did so. Un-

fortunately, the Unemployment Compensation Review Board had couched its questions in such biased language as to "actual conduct in respect of the contract" that the firm's brief, (which could not, under the license accorded the firm, carry additional facts—aside from contracts—into the record for consideration by the Appellate Court) could accomplish little to produce an opinion at odds which the Board indicated it desired. Of course, opinions rendered by the Appellate Court in response to certified questions of law by administrative or executive bodies, are not in any manner binding on the persons whose interests are involved in the questions, and they are not binding precedents.

Estate ex rel. v. *McMahan*, 194 Ind. 151.
Venable v. *Fairmont Glass Works*, 83 Ind. App. 77.
Evans v. *Watt*, 90 Ind. App. 37.
Bimel Spoke Co. v. *Loper*, 65 Ind. App. 479.

So also held the Marshall Circuit Court decision. (Tr. 402b.)

Aside from these considerations, and what to us appears as the construction of a paradox by petitioner, the Appellate Court did not hold that the corporation or Tomlinson or the four lessees, in any manner sustained the relationship of master or employer toward the workers, but held that the workers were the *employees of whichever of their number might, for the time being, constitute the Board of Control of the firm*—whosoever the workers might elect. In other words, under the Appellate Court decision Tanner, who then was but who no longer is a member of the Board of Control, is now an *employee* of the other members, though before the election which supplanted him, he was, by the terms of the opinion, one of the *employers* of the very person who took his place on the Board. Russell Travis, who was never an officer of the corporation or lessee (excepting as every other worker

became such) was held to be an "employer" from November 7, 1939, to January 1, 1941, (Tr. 44, and see p. 640 of 108 Ind. App.), and on the latter date became and has continuously since been an *employee* of his present *employers*, who before that date were his "*employees.*" The utter absurdity of the holding is reflected in the brief of the petitioner who carefully refrains from alluding to the ultimate answers given by the Appellate Court to the questions, as contained in the report of the case, and which, so far as the Court and Board were concerned, constituted the vitals of the determination. Ironically too, is petitioner's contention that the Courts below had before them a rule of decision from Indiana to which they must yield their own judgment, if the latter conflicts, and yet, the petitioner urged a holding far at variance with that "decision." At no point did petitioner undertake to have the Courts hold that the members of the Board of Control, in the various stages of the history of the firm, are the "employers" as so held in the answers given by the Appellate Court. On the contrary, petitioner insisted that the Board of Control was a mere pawn or instrumentality of the corporation and individual respondents.

What apparently is sought by petitioner is a review of facts—a new set of inferences (however untenable) to be drawn therefrom, and a reversal of the trial court and of the Circuit Court of Appeals, not on pure questions of law, but by the substitution of deductive assumptions to support the petitioner's contentions for the present judicially and judiciously drawn inferences supported by the evidence in the record. This Court has heretofore assiduously avoided any substitution of its own conclusions of fact for the ultimate facts found by the courts *nisi*, where the latter rested on substantial evidence. This has been true even where a different conclusion on facts then found

by the triers thereof was well warranted by the evidence. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 68 L. ed. 413, 44 S. Ct., 164. This was the rule before adoption of the present Rules of Practice and Procedure. *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U. S. 175, 82 L. ed. 1273. And now, that all Circuit Courts of Appeal are specifically admonished by Rule that

> "Findings of fact shall not be set aside unless clearly erroneous." (Rule 52 (a) Rules of Civil Procedure.)

unjust, indeed, it is to propose that this Court should do, on certiorari to a Circuit Court of Appeals, what this Court has forbidden the Circuit Court of Appeals doing in a review of the same case!

It is respectfully submitted that the petition for the writ should be denied.

ALBERT B. CHIPMAN,
WALTER R. ARNOLD,
Attorneys for Respondents.

Dated April 15, 1944.

Explanatory Note.

It being the duty of counsel to bring to the attention of this Court any matter which might affect the Court's jurisdiction in the case, where it is matter *de hors* the record, it behooves the undersigned, as heretofore representing Plymouth Manufacturing Corporation and its counsel of record, to advise that since the case was disposed of below, his client, Plymouth Manufacturing Corporation, has ceased its existence. As shown by the record and opinion of the Circuit Court of Appeals (Tr. 205, 206, 281 and 431) the corporation was in process of dissolution at the time of trial. It completed dissolution proceedings pending the appeal. After dissolution its property was disposed of to five or six other persons, including the fee simple title to the plant, who now hold the same as tenants in common. The undersigned has not been employed by these individual owners, and is not, therefore, authorized to ask their substitution. No desire on the part of any of the other respondents exists to press this to the court's notice as grounds for refusing to consider the petition, but the undersigned deems it to be his duty to state that, *causa mortis*, he has not longer a client in this case.

ALBERT B. CHIPMAN,
Formerly attorney for Plymouth Manufacturing Corporation.